No. _____

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TODD RANDOLPH VAN DOORNE,

Defendant-Appellant.

ON APPEAL FROM THE KENT COUNTY CIRCUIT COURT

Court of Appeals Case No. 323643

Kent County Circuit Court Case No. 14-003215-FH

APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law

Constitutional Provisions

Other Authorities

STATEMENT OF JURISDICTION AND PROCEDURAL HISTORY

This is an interlocutory application for leave to appeal an Opinion of the Michigan Court of Appeals affirming the trial court's denial of Appellant's Motion to Suppress Evidence.

On August 26, 2014, the trial court issued an Opinion and Order denying the Appellant's Motion to Suppress. On October 15, 2014, the Michigan Court of Appeals denied leave to appeal. On December 2, 2014, Appellant filed his application for leave to this Court.

On April 10, 2015, this Court, in lieu of granting leave, remanded this case to the Court of Appeals with instructions to consider whether the knock and talk procedure conducted in the instant case was consistent with the Fourth Amendment as articulated in *Florida v Jardines*, 133 S Ct 1409 (2013). In a split decision, issued on December 8, 2015 and released for publication, the Michigan Court of Appeals affirmed the trial court's decision.

Defendant-Appellant now timely files this Application for Leave to Appeal within 56 days from the date of entry of the Order, pursuant to MCR 7.301(A)(2). This Court has jurisdiction pursuant to MCR 7.205(A)(1).

STANDARD OF REVIEW

Whether a search violated the fourth amendment involves a question of constitutional law that the court reviews de novo. *People v Pitts*, 222 Mich App 260, 263 (1997). "A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Hrlic*, 277 Mich App 260, 262-263 (2007).

QUESTIONS PRESENTED FOR REVIEW

Defendant-Appellant raises the following assignment of error:

I. DID THE COURT OF APPEALS ERR WHERE IT LIMITED THE SUPREME COURT'S REMAND DIRECTIVE AND FAILED TO CONSIDER WHETHER A CONSTITUTIONAL VIOLATION OCURRED WHERE THE POLICE PERFORMED A "KNOCK AND TALK" AT A PRIVATE RESIDENCE IN THE MIDDLE OF THE NIGHT, WITHOUT EVIDENCE THAT THE OCCUPANT EXTENDED AN EXPLICIT OR IMPLICIT INVITATION TO STRANGERS TO VISIT DURING THOSE HOURS?

The Court of Appeals Answers: "No"
Defendant-Appellant Answers: "Yes"
The Plaintiff-Appellee Answers: "No"

II. DID THE COURT OF APPEALS ERR BY RULING THERE WAS NOT A SEARCH WHERE SEVEN ARMED OFFICERS INTRUDED ONTO THE CURTILAGE OF A HOME IN THE MIDDLE OF NIGHT WITHOUT A WARRANT SEARCHING FOR EVIDENCE?

The Court of Appeals Answers: "No"
Defendant-Appellant Answers: "Yes"
The Plaintiff-Appellee Answers: "No"

GROUNDS FOR GRANTING LEAVE TO APPEAL

In a non-totalitarian state, middle-of-the-night police intrusions are impermissible, absent a compelling emergency (such as "your house is on fire") or a warrant. In this case there was neither. Under the guise of a "knock and talk," seven armed police officers descended on a family home in the dark, pre-dawn hours of March 18, 2014, pounded loudly on the door and rang the doorbell for several minutes. The now-awakened, half-asleep occupants were interrogated and the home searched, in what can only be categorized as a patently unreasonable search and an outrageous violation of the Fourth Amendment.

The police actions in this case were calculated and intentional; the police were at Van Doorne's home to search for and seize marijuana butter. There was no justification for this unwarranted, unwelcomed nighttime intrusion and no reason the citizen contact could not have waited until a reasonable hour. In addition, the police officers had sufficient probable cause to obtain a search warrant but instead chose to conduct this alarming "knock and talk." The totality of the circumstances are disturbing and should shock the judicial conscience. Seven peace officers intentionally disturbed the domestic peace and tranquility of a home under the cover of darkness to conduct a warrantless search.

In Appellant's prior application for leave to appeal to this Court, he noted that the United States Supreme Court had issued an important decision, *Florida v Jardines*, 569 US ___, 133 S Ct 1409, 1416 (2013), which provided limits on the breadth and scope of a permissible knock and talk citizen-police encounter. In reaching its decision, the High Court applied traditional property law principles to restrict entry onto an individual's curtilage, if such entry is in violation of the citizen's implied license to enter.

This Court has yet to directly address the constitutionality of knock and talks. Appellant's case was remanded in April 2015 to the Court of Appeals for it to consider whether the knock and talk performed in this case was consistent with the Fourth Amendment as articulated in *Florida v Jardines*. Unfortunately, the Court of Appeals majority misinterpreted the directive and narrowly construed the scope of remand to only address whether or not a search had occurred, while ignoring whether the search was reasonable, including the manner in which the officers entered the curtilage. Judge Servitto in her dissent in this case, properly framed the question that should have been answered by the majority, to wit: "whether a knock and talk procedure conducted at a private residence in the middle of the night . . . without evidence that the occupant of the residence extended an explicit or implicit invitation to strangers to visit during those hours, is an unconstitutional search in violation of the Fourth Amendment."

Not only did the majority fail to properly interpret the legal import of *Jardines* on the parameters of a legal knock and talk, but its decision has, in essence, removed all limitations on a permissible knock and talk, so long as the officer: (a) approaches by the front path, and (b) actually knocks on the front door. The majority deems the officers' objective purpose irrelevant, the time non-dispositive, and the number of officers unimportant. The majority applied the conclusion of *Jardines* while discarding the Supreme Court's reasoning as valueless. The question of *how* the officers gained entry onto the curtilage was deemed insignificant. *People v Frederick*, ___ Mich App ___; 2015 WL 8215150, at * (December 8, 2015), (Servitto, J., dissenting).

The Court of Appeals majority decision is a disaster for Fourth Amendment jurisprudence; interestingly, its reasoning also runs contrary to every published opinion Appellant could locate that has interpreted *Jardines,* whether federal or state. Leave must be granted in this matter to

reverse the appellate court and ensure that Michigan law remains harmonious with the rest of the country.

This Court should Grant Leave to Appeal as the issue has significant public interest and involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(2) and (3). Additionally, this application also satisfies MCR 7.302(B)(4).

STATEMENT OF FACTS

On March 17, 2014 at 10:15 p.m., the Kent Area Narcotics Enforcement Team ("KANET") executed a search warrant at the home of Timothy and Alyssa Scherzer. Interrogation revealed that Scherzer had supplied marihuana butter to his registered qualifying patients, four of whom were employees of the corrections division of the Kent County Sheriff Department ("KCSD").

Defendant-Appellant Todd Van Doorne ("Van Doorne") was one of those KCSD employees. His name only came to light when his medical marihuana card was discovered during the execution of the search warrant. (Tr. 6/30/14, 114:2-21).

Upon learning that Van Doorne was Scherzer's patient and had received marihuana butter, the KANET team decided to execute a series of late night "knock and talks" instead of seeking search warrants (as this would cast a negative light on the Department). (Tr. 7/2/14, 24:4-9). The seven-member KANET retinue, in five unmarked vehicles, went en masse to each officer's home in the middle of the night and predawn hours of March 18, 2014. The respective "visits" occurred at approximately 1:00 a.m., 2:45 a.m., 4:00 a.m., and 5:30 a.m.

Testimony evidenced that late-night "knock and talks" are a common tactic of KANET. Det. Butler testified that ten percent of knock and talks occurred after 1:00 a.m. (Tr. 6/30/14, 58:13-59:2). Dep. Tuinhoff testified that of the twenty knock and talks he has performed, almost half occurred after 1:00 a.m. (Tr. 6/30/14, 33:3-16). Multiple members of KANET testified that it would be unreasonable for a salesman, a Girl Scout selling cookies, or traveling evangelist to knock or ring their doorbell at 4:00 or 5:30 a.m. in the morning. (Tr. 6/30/14, 90:15-91:3; Tr. 7/2/14, 21:16-17).

The seven-member KANET team approached Van Doorne's home at 5:30 a.m. (Tr. 6/30/14, 10:2-7). Lt. Alan Roetman testified he was aware Van Doorne had called in sick for work

that day. (Tr. 7/2/14 16:5-8). Van Doorne testified his entire family had the flu and were battling its symptoms. (Tr. 7/2/14, 102:20-103:4). Van Doorne made several attempts to call in sick during the night and finally reached someone at the jail around 4:00 a.m. The entire Van Doorne family was sound asleep at 5:30 a.m. (Tr. 7/14/15, 17:4-9).

Testimony from the KANET officers all agreed that the Van Doorne household appeared to be asleep at 5:30 a.m., as there were no lights nor movement inside the home. (Tr. 7/2/14, 15:9-17). The team had their firearms visible and wore tactical vests. (Tr. 7/2/14, 70:4-16). Lt. Roetman and Sgt. Kaechele testified they approached the rear door of the home, pounded loudly and rang the doorbell for somewhere between two and five minutes. (Tr. 7/2/14, 88:4-7).

Van Doorne and his family were awoken from deep sleep, alarmed to hear loud banging on their door and incessant ringing of the doorbell that went something like: "bing, bing, bing on the doorbell, then pound, pound, pound, and the cycle repeated and repeated and repeated." (Tr. 7/2/14, 104:23-105:1) Van Doorne testified the barrage of noise went on for two to four minutes while he got dressed. He considered grabbing the shotgun next to his bed. (Tr. 7/2/14, 105:5-8). When able to look outside, he observed multiple cars lining his driveway, their lights shining on the home, and multiple officers in tactical gear. (Tr. 7/2/14, 105:10-15).

Van Doorne opened the basement door and asked Lt. Roetman what was going on, to which his Lieutenant responded: "we're here about the butter." (Tr. 7/2/14, 106:12-23). Van Doorne recognized them as his superior officers and felt compelled to let them into his home despite the late hour. (Tr. 7/2/14 107:20-108:16; 113:22-114:12). During the conversation between Lt. Roetman and Van Doorne, Lt. Roetman indicated to Van Doorne that the officers chose not to obtain search warrants because the Sherriff's Department wanted to avoid a public record of the situation. (Tr. 7/14/14, 17:19-25). Lt. Roetman confirmed that had the officers obtained search

warrants, it would be in the record and the "media would get ahold of it right away." (Tr. 7/2/14, 24:6-9).

Eventually, Van Doorne relented and consented to a search of his home. The subsequent search yielded marihuana butter and brownies Van Doorne was using for his medical condition pursuant to his MMMA card. Van Doorne was charged with Possession of Marijuana and with Maintaining a Drug House.

ARGUMENT

I. The Remand Directive From the Supreme Court Was Not Limited To Determining Whether a Search Occurred.

On April 10, 2015, this Court ordered that, "the Court of Appeals shall address whether the 'knock and talk' procedure conducted in this case is consistent with US Const, Am IV, as articulated in *Florida v Jardines*, 133 S Ct 1409 (2013)." *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015). The appeals court majority interpreted this directive to mean that its inquiry was narrowly limited to the question of whether the knock and talk procedure performed in this case amounted to a "search". This interpretation was in error, as this Court's directive was not so narrow, nor was the *Jardines* Court's inquiry so limited. As the dissent correctly noted, the Fourth Amendment is not limited to whether a search alone has occurred, but rather, whether the search was unreasonable. *People v Frederick*, ___ Mich App ___; 2015 WL 8215150, at *3 (December 8, 2015), (Servitto, J., dissenting).

A. Application of *Jardines*.

In *Jardines*, the United States Supreme Court restated the basic tenet that a search within the meaning of the Fourth Amendment occurs when a government actor obtains information by physically intruding on persons or houses. *Id.* at 1414. According to *Jardines*:

> That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

The Supreme Court, after finding that the officers in *Jardines* had been physically present in a constitutionally protected area, then considered whether the entry into the curtilage "was accomplished through an unlicensed physical intrusion… [and] whether [Jardines] had given his leave (even implicitly) for them to do so." *Id.* at 1415. The Court then focused on the scope of the implicit license and the objective reasonableness of what it deemed to be an obvious search. The Supreme Court's emphasis on objective reasonableness makes sense, because the Fourth Amendment only protects against *unreasonable* searches and seizures. The *Jardines* court stated,

> . . . the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered.

Id. at 1416-1417 (emphasis in original).

According to the *Jardines* Court:

> A license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. *Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.*

Id. at 1415-1416 (internal citations and quotations omitted and emphasis added).

Thus, though the final holding of *Jardines* was that a search had occurred, that ultimate answer required an expansive inquiry and analysis into various factors, including the *context* of the procedure employed and the *reasonableness* of the officers' actions.

In the instant case, the Court of Appeals majority used the holding of *Jardines* (there was a search) but ignored the lengthy reasoning (implied license) required to reach said conclusion. In so doing the majority entirely missed the mark in its analysis: the search in this case was the outcome of the unconstitutional actions that preceded it. However, unlike the majority opinion in this case, the *Jardines* opinion suggests that Fourth Amendment jurisprudence principles render the inquiry straightforward. *Id.* at 1414. If police officers enter a constitutionally protected area, and access to said area is accomplished through an unpermitted physical intrusion, the unlicensed intrusion does not pass constitutional muster.

The law in Michigan, however, has so far followed a different course. As a general proposition, a knock and talk represents one tactic employed by police officers that does not *normally* implicate the Fourth Amendment. *See, e.g.*, *People v Frohriep*, 247 Mich App 692, 698 (2001) ("We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections."). The *Frohriep* Court did recognize, however, that knock and talks are not entirely without constitutional implications (or limitation), "[a]nytime the police initiate a procedure, whether by search warrant or otherwise, the particular circumstances are subject to judicial review to ensure compliance with general constitutional protections. Accordingly, what happens within the context of a knock and talk contact and any resulting search is certainly subject to judicial review." *Id.* at 698.

As of this date, this Court has addressed neither the constitutionality nor the practical limitations of the knock and talk procedure. *See People v Gilliam*, 479 Mich 253, 276 n. 13 (2007)

(Kelly, J., dissenting). Members of the law enforcement community and citizens alike are left to rely on the wisdom and guidance of the Court of Appeals. Thus far, the Court of Appeals decision in *Frohriep*, among others, has provided useful advice on the limitations of knock and talk encounters. However, following the *Jardines* ruling, many courts and legal scholars have begun to question the constitutional providence of knock and talks. *See* discussion in I, B, *infra*; *see also* Jamesa J. Drake, *Article: Knock and Talk No More*, 67 ME. L. REV. 25, 26 (2015) (declaring that "[t]he Supreme Court has set out a roadmap for challenging one of the most common and insidious police tactics used today . . . . [t]he path is short and clear and it leads to the inescapable conclusion that the knock-and-talk – as it is actually employed in practice – is unconstitutional."). Unfortunately in the instant case, the Michigan Court of Appeals, in speaking for the entire State, held that no true limitations exist for this law enforcement tactic.

Ultimately, the Court of Appeals majority asserts that in general a knock and talk is acceptable so long as a police officer approaches a home by the front path, knocks promptly, waits momentarily to be received, and then leaves, unless there is an invitation to linger longer. The majority then contends that nothing more egregious occurred in this case. Therefore, in the majority's opinion, the officers' conduct in this case is squared with the *Jardines* opinion. However, the majority's logic does not flow from the ruling in *Jardines*. The *Jardines* Court did not *presume* that the entry onto a citizen's curtilage was acceptable. Rather, the Court reasoned that the entry must comport with the implied license to enter.

Based on *Jardines*, and the Michigan Supreme Court's remand directive, the dissent in this case correctly identified the issue that should have been determined by the appeals court: whether a knock and talk procedure conducted at a private residence in the middle of the night (the "pre-dawn hours"), without evidence that the occupant of the residence extended an explicit or implicit

invitation to strangers to visit during those hours, is an unconstitutional search in violation of the Fourth Amendment. Unfortunately, the majority left this question unanswered.

B. How Other Jurisdictions Have Applied *Jardines*.

Other jurisdictions have consistently interpreted *Jardines* as a limitation on knock and talks. Most recently, the Eleventh Circuit Court of Appeals in *United States v Walker*, 799 F3d 1361 (CA 11 2015), was presented with a middle-of-the-night police approach. Local law enforcement were looking for an individual on an outstanding warrant. Information was provided that said individual could be located at Walker's residence. *Id.* at 1362.The officers knocked on Walker's door twice on the evening of February 28, 2014 – first at approximately 9:00 p.m., and then again at 11:00 p.m. There was no answer either time. *Id.* The officers once more drove by the home at approximately 5:00 a.m. the following morning, and at this time, observed a light on in the home and a car parked outside with its interior lights illuminated. *Id.* The officers again approached, and made contact with Walker inside the vehicle; consent to search was obtained. *Id.* at 1363.

The Eleventh Circuit eventually concluded that the knock and talk did not violate the Fourth Amendment. Nevertheless, the *Walker* Court reasoned that the scope of a knock and talk is limited in two respects. First, the court indicated that this exception to the warrant requirement "ceases where an officer's behavior '*objectively reveals a purpose to conduct a search.*'" *Jardines*, 133 S Ct at 1416-1417 (emphasis added). The second limitation is that the exception is limited to the front door or a minor departure therefrom. *Walker*, 799 F3d at 1363. When finding that the knock and talk was permissible, the *Walker* Court noted that the officers' actions did not reveal an objective intent to search because they were merely *looking* for another person based on information that the wanted individual *may* have been at Walker's residence. *Id.* at 1363-64.

The Alaska Court of Appeals also engaged in a lengthy discussion of the practical application of the implied license theory. In *Kelley v State*, 347 P3d 1012 (Alas Ct App 2015), two Alaska state troopers, acting on an anonymous tip, drove up a defendant's driveway to her residence shortly after midnight. The troopers remained in their car for several minutes sniffing the air. *Id.* at 1013. After they detected an odor of marijuana, the troopers left and obtained a warrant to search the home. *Id.* Kelley challenged the officers' violation of the implied license to approach her home in such a manner. The trial court denied the defendant's motion to suppress, reasoning that the driveway to the defendant's house was impliedly open to public use because it provided public ingress to and egress from her property. *Id.*

In reversing the trial court, the Alaska Court of Appeals recognized *Jardines*' holding that a police officer has an implicit license to approach a home without a warrant and knock on the door because it is no more than a private citizen might also do. *Id.* at 1014. It also pointed out, however, that in *Jardines* the United States Supreme Court recognized that the scope of the implicit license limited the *manner* of the visit:

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.

Kelley, 347 P3d at 1014 (quoting *Jardines*, 133 S Ct at 1416).

The *Kelley* Court thus found that *the manner of the visit* was of paramount importance to the *Jardines* reasoning and framework for determining the scope of an implied license for approaching a home without a warrant. The *Kelley* Court reasoned that the search that took place was more intrusive than that in *Jardines* because it took place after midnight. *Kelley*, 347 P3d at 1014. In reaching this conclusion, the court cited to the dissent in *Jardines* where Justice Alito indicated that a visitor could not come to a home in the middle of the night without express

invitation, and further noted that the majority in *Jardines* "referred approvingly to the dissent's 'no-night-visits rule.'" *Kelley*, 347 P3d at 1014-15.

Notably, the *Kelley* case is not a true knock and talk opinion, as the troopers' conduct did not indicate that they were performing a traditional knock and talk. *Id.* at 1016 (reasoning that "the legal principles that govern a 'knock and talk' do not apply here because the State never asserted, and the record does not show, that the troopers approached Kelley's residence to engage in a 'knock and talk.'"). However, despite this slight factual variation, the *Kelley* majority did point out that the knock and talk cases relied upon by the dissenting opinion *all* considered the time of the knock and talk as an important factor to consider in assessing its "overall coerciveness and lawfulness." *Id.*

In one of the first cases to consider the *Jardines* decision, the United States District Court for the Northern District of California, in *United States v Lundin*, 47 F Supp 3d 1003 (ND Cal 2014), considered a case with disturbing facts. After interviewing a kidnapping victim at a hospital in the early morning hours, a police officer contacted dispatch and requested a "be on the lookout" the kidnapper, Lundin. *Id.* at 1007-1008. The officer further requested that Lundin be arrested on several charges. In response, multiple officers drove to Lundin's home at approximately 4:00 a.m. and knocked on his front door. *Id.* at 1008. The officers heard loud crashing in the backyard and they ordered whoever was out in the backyard to come out, at which point Lundin exited the backyard and was taken into custody. *Id.* Officers then searched Lundin's home and backyard, finding two firearms. *Id.* at 1009.

The District Court proclaimed that "it is 'a firmly-rooted notion in Fourth Amendment jurisprudence' that a resident's expectation of privacy is not violated, at least in many circumstances, when an officer intrudes briefly on a front porch to knock on a door in a

noncoercive manner to ask questions of a resident." *Id.* at 1010. Following *Jardines*' lead, the *Lundin* Court noted that an officer's ability to approach the front porch is predicated on the implied license that is typically extended to strangers to approach the home by the front path, knock, and linger briefly to be received, and absent invitation to stay longer, leave. *Id.* at 1011. In *Lundin*, there were two factors that indicated the officers' conduct in that case exceeded the scope of the recognized implied license: (1) their purpose was to locate Lundin and to arrest him; (2) the approach took place at 4:00 a.m. *Id.*

With respect to the first issue, the *Lundin* court indicated that whether the officer's conduct was an objectively reasonable search turns on whether the officers had an implied license to enter the porch, "which in turn *depends upon the purpose for which they entered.*" *Id.* at 1012 (emphasis in original). While not dispositive in determining whether the officers' "visit" fell within the scope of a lawful knock and talk, it was – at a minimum – a significant factor. *Id.* at 1013. However, beyond the purpose of the officers' entry was the time of the visit – 4:00 a.m. The court noted that such an early hour is "a time at which most residents do not extend an implied license for strangers to visit." *Id.* The *Lundin* court resolved its extensive analysis by concluding that, "[b]y entering onto Lundin's curtilage at four in the morning for the purpose of locating Lundin to arrest him, the officers engaged not in a lawful 'knock and talk' but rather in a *presumptively unreasonable search.*" *Id.* at 1014 (emphasis added).

The Kentucky Supreme Court, when presented with a situation where an officer did not attempt to contact the homeowner, nonetheless found it necessary to address the time of day when determining whether the visit was reasonable. *Commonwealth v Ousley*, 393 SW3d 15 (Ky, 2013). The *Ousley* court stated, "[s]urely there is no reasonable basis for consent to ordinary public access, presumed or otherwise, for the public to enter one's property at midnight absent business with the

homeowner. Girl Scouts, pollsters, mail carriers, door-to-door salesmen just do not knock on one's door at midnight . . . ." *Id.* at 30. The court also noted that a time limitation in some form or another appears in several other curtilage cases and that:

> One of the earliest knock-and-talk cases laid out the rule as follows:
>
> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, *at high noon*, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.
>
> *Davis v United States*, 327 F2d 301, 303 (9th Cir 1964), *impliedly overruled on other grounds as suggested in United States v Perea–Rey*, 680 F3d 1179, 1187 (9th Cir 2012) (emphasis added).
>
> As *Davis* went on to note, "The time of day, coupled with the openness of the officers' approach to defendant's doorway, rules out the possible dangers to their persons which might have resulted from a similar unannounced call in the dead of night." *Id.* at 304. Numerous other cases mention time of the invasion as a factor in whether the Fourth Amendment is violated.

Id. at 30-31.

The *Ousley* Court closed its reasoning by emphasizing that, "just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so." *Id.* at 31 (emphasis in original).

Finally, in a case which pre-dates *Jardines*, *State v Cada*, 129 Idaho 224 (1996), the Idaho Supreme Court considered time as a factor in determining the reasonableness of police actions when entering a citizens property. The court considered observations made by police from a defendant's driveway during 1:00 a.m. and 4:00 a.m. *Id.* at 233. The Idaho Supreme Court indicated that the time of day and openness of the officer's approach have been found to be *significant factors* in determining whether the scope of the implied invitation to enter areas of a

private home's curtilage were exceeded. *Id.* "Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors." *Id.* at 233.

While the majority in this instant case made painstaking efforts to minimize the impact of these cases cited, *supra*, it is important to note that they did not present a single authority which supported their position. Unfortunately, Michigan now stands in an ignominious position. Should this Court not accept leave to appeal and provide finality to this debate, the citizens of this State will have little to no practical defense to continued, impermissible "knock and talks". In no uncertain terms, the Court of Appeals' decision in this case provides *no limitation* on this practice. If a knock and talk performed with the stated goal of gathering evidence without a warrant (not seeking consent to search) in the wee hours of the morning does not lead the Court of Appeals to find a Fourth Amendment violation, nothing will. This Court must protect the Fourth Amendment from being swallowed by its exceptions.

II. The Court of Appeals erred when it failed to find that the "Knock and Talk" Procedure Conducted in the Instant Case Was an Unconstitutional Search in Violation of the Fourth Amendment.

In the instant case, it is not disputed that the seven police officers entered onto the curtilage of the home – a constitutionally protected area – as soon as they stood at Van Doorne's threshold and knocked on his door. The remaining inquiry then, is whether the officers' intrusion onto the curtilage was within the scope of an implied license to enter.

It follows, therefore, that a knock and talk performed in violation of the implied license no longer qualifies as an exception to the warrant requirement of the Fourth Amendment. "One virtue of the Fourth Amendments property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather

evidence is enough to establish that a search occurred." *Jardines*, 133 S Ct at 1417. And, any search without a warrant is "per se unreasonable." *Katz v United States*, 389 US 347, 357 (1967).

Law enforcement officers, like other citizens, have an implied license to enter onto another's land, approach the front door of the home, and attempt to engage the occupants in a consensual conversation. However, just like other citizens, police officers may not approach a home with the intent to conduct a search, because the "background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Jardines*, 133 S Ct at 1416. The reason that an objectively manifested intent to search vitiates the use of a knock and talk is because the exception relies exclusively on whether the officers had an implied license to even enter the property at all, "which in turn depends upon the purpose for which [the officers] entered." *Id.* at 1416-17.

Where the officers' behavior "objectively reveals a purpose to conduct a search" the implied license is no longer extended because conducting a search "is not what anyone would think [they] had a license to do." *Id.* The *Jardines* holding requires an analysis of the attendant circumstances in order to determine whether the officers' acts were within the scope of the implied license. *See Lundin, supra.*

A. The Manner of Approach of the Police Officers to the Van Doorne Residence Reveals an Intent to Search.

For a police officer to avail himself of the knock and talk exception to the warrant requirement, both the initial entry onto the property *and* the subsequent conduct on the property must be reasonable and not objectively indicate that the officers' purpose was to initiate a warrantless search. *Jardines*, 133 S Ct at 1417.

The objective intent of the officers is best shown by the events which unfolded in the Van Doorne driveway. Besides the time of the search, *infra*, the officer's approach to the residence

indicated this "knock and talk" was intended to be more than mere conversation. Seven armed officers arrived at the home in four or five vehicles. Van Doorne testified the vehicles were parked in the driveway with their lights shining into his home. Four officers approached his door wearing tactical vests, and two of his superior officers repeatedly pounded on the door and rang the doorbell for a lengthy amount of time.

A similar approach by an armed posse of citizens could hardly be characterized as merely an attempt to engage an occupant in conversation. The implied license to visit surely does not include such invasive "visits". It should be plain that these officers did not come to talk, but rather, came to search the home for marijuana butter they knew was present, and they were not going to leave until they had accomplished their goal. Not surprisingly, the first statement from the commanding officer was to advise Van Doorne: "we're here about the butter." (Tr. 7/2/14, 106:12-23).

It should be clear from the facts that the officers went to Van Doorne's home that morning at 5:30 a.m. to conduct a warrantless search of his home—not to engage him in consensual conversation. There is nothing to suggest that Van Doorne manifested an implied license to the general public that his home was open to search or that he received visitors at that hour. As stated by the dissenting opinion, "[i]t is difficult to conceive of a reason why it would be necessary for seven officers to come to the home of another officer at 4:00 a.m. or 5:30 a.m. for the stated purpose of simply asking questions." *Frederick*, 2015 WL 8215150, at *7, (Servitto, J., dissenting).

The implied license to approach a home does allow for social visitors—such as the Girl Scouts—to approach the door and attempt to engage in a consensual encounter. However, the Girl Scouts, unlike the KANET team, do not approach a home in the middle of the night, seven at a time, armed and wearing tactical vests, and cause a ruckus awakening all of the occupants.

In sum, an objective third party, such as a neighbor, would have observed the events that unfolded in Van Doorne's curtilage and concluded that the KANET team was present to conduct a search. Because the KANET team breached the implied license, their actions cannot be categorized as a permissible knock and talk.

B. The Timing and Manner of Knocking and Lingering Reveals an Intent to Search.

As noted by the dissenting opinion in this case, while the time of the knock and talk was not the singular deciding factor in determining the search was unreasonable, it is at the very least a significant factor among those to be considered among the totality of the circumstances. Similarly, with varying degrees of agreement, all nine justices in *Jardines* accepted the proposition that the general implied license to approach someone's front door extends only during daylight hours. *Jardines*, 133 S Ct at 1422 (Alito, J., dissenting) ("Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation."); *Id.* at 1416, n. 3 (majority op.) ("the dissent quite rightly relies upon" the proposition that a typical person would be greatly alarmed by nighttime intrusions "to justify its no-night-visits rule").

The *Jardines* majority reasoned, "a license may be implied from the habits of the country." *Id.* at 1415 (quoting *McKee v Gratz*, 260 US 127, 136 (1922)). It would appear to be obvious that the "habits of the country" do not include uninvited visits at 5:30 a.m., absent some indication that the person accepts visitors at that hour or, where it is clearly observed that someone is awake in the home.

In the present case, however, lies a deeper issue that the officers were, and continue to be, under the impression that the time of day does not matter. As Lt. Roetman testified: "We could've waited two hours. We could have gone earlier. We could've gone to [Van Doorne's] house instead of Mr. Tennant's first. I mean, *time is irrelevant*." (Tr. 7/2/14, 21:4-7) (emphasis added). Such

testimony from a high-ranking lieutenant demonstrates a fundamental misunderstanding and ignorance of the scope of the implied license which permits a knock and talk at all. As the Third Circuit in *Carman v Carroll*, 749 F3d 192 (CA 3, 2014) (rev'd on other grounds), cautioned: "While it may have been more convenient . . . the Fourth Amendment is not grounded in expediency." 749 F3d at 199.

All nine Justices in *Jardines* agreed: a knock and talk is only acceptable if it is performed within an implied license based upon community standards. Here, the testimony is undisputed that the pounding and doorbell ringing went on for two to five minutes and woke the occupants. Continued knocking and ringing of the doorbell warrants at least an investigation by the resident, especially during early morning hours. There is no way Van Doorne could have ignored the cacophony of noise emanating from his basement door. The implied license to knock at Van Doorne's door was never extended to 5:30 a.m. By breaching the implied license, the intrusion can no longer be categorized as a knock and talk, but rather, it was a warrantless search in violation of the Fourth Amendment. As noted by the Kentucky Supreme Court: ". . . the time of day of the invasion matters. Surely there is no reasonable basis for consent to ordinary public access, presumed or otherwise, for the public to enter one's property at midnight absent business with the homeowner." *Ousley*, *supra*, 393 SW3d at 30.

When viewed objectively, no reasonable person would conclude that, based on the two factors analyzed above, the KANET Team was at the home to engage Van Doorne in a consensual conversation. The number of armed officers who approached the home wearing tactical vests, the number of cars that littered the driveway with their lights trained on the house, together with the timing and manner of the search eviscerates any indicia that this was a knock and talk.

C. The Officers Failed to Follow Community Standards When Knocking and Lingering at Van Doorne's Home in the Pre-dawn Hours.

As the *Jardines* opinion highlights, officers may "'knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.'" *Jardines*, 133 S Ct at 1415. An implied license generally invites an uninvited guest to knock on the door and *briefly wait* for an answer. It seems to go without saying that this implied license does not allow a guest to pound on a door and ring the doorbell incessantly until the homeowner answers the door. In addition, it is only common sense to conclude that a home that is completely dark without movement inside at 5:30 a.m. is a generally accepted indication that its occupants are asleep. No uninvited visitor would think they had an implied license to continue to pound on the door and ring the doorbell until they received an answer. This would be unacceptable behavior for a member of the public, and as such was also unacceptable behavior for the police officers in this case.

Besides the time of the search, the officer's approach to the residence indicated that this "knock and talk" was intended to encompass more than mere conversation. Seven armed officers arrived at the home in four or five vehicles parked in the driveway with their lights shining into the home. Four armed officers approached the door in tactical vests while three remained behind. The implied license to visit surely does not encompass such "visits." It should be plain that these officers did not come to talk, but rather, came to search the home for marijuana butter and were not going to leave (and did not) until they had accomplished their objective.

CONCLUSION

A knock and talk performed on a person or home in violation of the implied license is an unreasonable search and seizure which violates the Fourth Amendment. The search of Appellant's home at a nighttime hour, the tactical approach of the officers, and the prolonged efforts at rousing Appellant from his tranquility demonstrates the officers' objective intent to conduct a search.

Although a knock and talk is an accepted practice rooted in the implied license of community members to approach the homes of their neighbors in an attempt to engage them in conversation, the tactics employed by the police in this case were unreasonable and outrageous. The police officers failed to obey a simple understanding which Girl Scouts, trick-or-treaters, and all other people approaching a neighbors' home have long followed: it is unacceptable by community standards to knock on your neighbors' door to engage them in conversation at 5:30 a.m. absent an invitation or an emergency.

The search of Appellant's home in this case cannot be justified by the "knock and talk" ordinary citizen contact rules, as the contact in this case was anything but ordinary. There was a warrantless search, with no exception, and consequently, all evidence stemming from this unconstitutional action must be suppressed. For the reasons stated and the authorities cited, Defendant Appellant Todd Van Doorne asks that this Court grant Leave to Appeal in this matter.

Respectfully Submitted,

BRUCE ALAN BLOCK, PLC

February 2, 2016

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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD RANDOLPH VAN DOORNE,

Defendant-Appellant.

Court of Appeals No.: 323643

Lower Court No.: 14-03215-FH

/

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/

NOTICE OF THE FILING
OF AN APPLICATION FOR LEAVE TO APPEAL

WHEREFORE, Todd Randolph Van Doorne, by and through his attorneys, Bruce Alan Block, PLC, hereby notifies this court that it has filed an Application for Leave to Appeal this Court's December 8, 2015 Opinion and Order with the Michigan Supreme Court.

Respectfully submitted,

Dated: February 2, 2016

Bruce Alan Block
Attorney for Defendant-Appellant